Midway Hospital Medical Center, Inc. d/b/a Midway Hospital Medical Center *and* Saskia Lodder, Petitioner and Health Care Employees Union, Local 399, Service Employees International Union, AFL–CIO. Case 31–RD–1399

April 28, 2000

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 2, 3, and 4, 1999, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The revised tally of ballots shows 152 for and 138 against the Union, with 11 challenged ballots, and 2 void ballots. The challenged ballots are insufficient in number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.[1]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Health Care Employees Union, Local 399, Service Employees International Union, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All service, maintenance, technical, and business office and hospital clerical employees including licensed vocational nurses, nursing attendants, aides, secretaries, technicians, drivers, orderlies, receptionists, counselors, food service employees, housekeeping employees and all other non-professional employees, all professional employees, including registered nurses, medical technologists, cytotechnologists, radiology technologists, nuclear medicine technologists, pharmacists, registered and registered-eligible respiratory therapists, certified respiratory technologists, laser lab technologists, registered physical therapists, ultrasound technologists, CAT/SCAN technologists, dieticians, and accountants employed by the Employer at its Los Angeles, California facility, excluding confidential employees, casual employees, guards and supervisors as defined in the Act.

MEMBER BRAME, dissenting.

Contrary to the majority, I would sustain the Employer's objections and set aside this election. As discussed more fully in the hearing officer's report, employee Joan Boucher, a paid union organizer and union observer in the election, engaged in a prolonged, 30-minute tirade against the Employer after being directed to leave the Employer's cafeteria during the period between the first and second sessions of balloting on June 3, 1999.[1] Boucher's tirade began in the cafeteria and continued as she walked toward the polling area. Upon arriving at the polling area, Boucher persisted in yelling in a loud voice about her treatment by the Employer while standing in close proximity to the polling area and within easy earshot of more than 20 employees who were waiting in line to vote when the polls opened. Boucher disregarded three separate directions by the Board agent in charge of the polling area to cease her disruption. At least in part as a consequence of Boucher's behavior, the polls opened 10 minutes late for the second session on that day.

I would find that Boucher was an agent of the Petitioner and that her conduct interfered with employee free choice in the election. First, the disruptive nature of Boucher's behavior alone, in the face of three clear directives to stop by the Board agent, which was witnessed by more than 20 employees and delayed the opening of the polls, raises serious questions about the fairness of this election.[2] In addition, Boucher's antiemployer diatribe constituted impermissible electioneering in violation of the rule set forth in *Milchem, Inc.,* 170 NLRB 362 (1968).

The hearing officer found that Boucher did not violate the *Milchem* rule because she did not "converse" with employees and no "exchange" of views took place. The hearing officer's apparent belief that the *Milchem* rule only applies to bilateral conversations and exchanges of view is erroneous. See *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 566–567 (1995) (the fact that a supervisory employee showed an antiunion poster to employees wait-

[1] For the reasons set forth in the portion of the hearing officer's report as an appendix, we find that the entirety of outbursts against the Employer by employee Joan Boucher, a union election observer, did not reasonably tend to interfere with employees' free choice in the election and does not require setting aside the results of that election. Furthermore, we agree with the hearing officer that Boucher's loud declamations for a few minutes while in the polling area did not violate the no-electioneering rule set forth in *Milchem, Inc.,* 170 NLRB 362 (1968). As our dissenting colleague suggests, unanswered messages by parties to the election may be construed as objectionable conversations under *Milchem* when those messages are directed at employees waiting to vote. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 566–567 (1995). However, Boucher's polling area complaints were directed to Union Representative Dana Hahn, management officials, and the Board agent in the polling area. Although those complaints were loud enough to be overheard by employees who were *outside that area* and waiting to vote, we disagree with the dissenting opinion that Boucher could reasonably be viewed as attempting to communicate with them. We, therefore, find no *Milchem* violation.

[1] Boucher falsely claimed that the Board agent conducting the election had given her permission to be in the cafeteria.

[2] See, e.g., *North of Market Senior Services v. NLRB,* 204 F.3d 1163 (D.C. Cir. 2000) (union agents' improper invasion of employer's facility on day of election interferes with election by creating impression that employer was helpless to control its own facility and stand up to the union).

ing in line to vote "establishes Respondent's violation of the *Milchem* rule—[the supervisor] effectively communicated with [the employees] while they waited in line by standing there and letting them read the poster"), enfd. in pertinent part 97 F.3d 65 (4th Cir. 1996). Accordingly, I would not adopt this erroneous finding.

The majority appears to recognize that the *Milchem* rule is not limited to bilateral conversations but finds, in the circumstances of this case, that Boucher's diatribe was directed at the Board agent and representatives of the parties—in short everyone present **except** the voters. In my view, this finding is contrary to the clear weight of the evidence. As the hearing officer acknowledged, the issue of off-duty employee access to the cafeteria was a major issue in the election. In these circumstances, the timing, volume, and content of Boucher's deliberate false statements that the Board agent gave her permission to be in the cafeteria, evidence an intention of reminding voters of the issue and communicating a disparaging view of the Employer's enforcement of its rules. I would find that her tirade in the presence of employees waiting to vote was not an isolated, chance, or spontaneous outburst but a deliberate effort to influence their votes in violation of the Board's *Milchem* rule. Under all of the foregoing circumstances, and considering the close margin of the election results, I would set aside this election.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

In support of the objections, the Employer called Anthony Stewart, the Employer's director of security; Gregg Yost, the Employer's director of human resources; Saskia Lodder, Petitioner; and Richard Kopenhefer, employer counsel, all of who were credible witnesses who presented uncontradicted testimony. The Union and the Petitioner presented no witnesses, and contented themselves with the evidence presented by the Employer.

The evidence presented established that on June 3, 1999, the first day of the 2-day manual election conducted by this Region at the Employer's premises, at approximately 1:30 to 1:40 p.m., prior to the scheduled 2 p.m. start of the second session; Joan Boucher, an employee of the Employer and also the union observer for the NLRB conducted election, was discovered in the Employer's cafeteria, an area which had been designated as an area off limits union representatives/agents unless prior permission had been received from the Employer. A stipulation was received during the course of the hearing, that Boucher was a paid union organizer for the Union during the period of time that Boucher was not on duty at he Employer as an employee of the Employer; which would have included the time in question, when Boucher was off duty and acting as the Union's observer.

Limited testimony was presented that the presence of union supporters, specifically Boucher, in the Employer's cafeteria was a major issue between the parties during the period leading up to the date of the election, which had culminated in the filing of unfair labor practice charges by the Union over the issue. A copy of such charge was made part of the record as Exhibit O to the Regional Director's Supplemental Decision, Order Directing Hearing on Objections and Challenges, Order Delaying Hearing on Challenges, and Notice of Hearing on Objections, dated September 23, 1999, which was the Board's Exhibit l(a) which was introduced and received into evidence without objection by any of the parties.

Upon Boucher's discovery in the Employer's cafeteria, Stewart was notified of Boucher's presence by one of his security officers, and Steward instructed the officer to inform Boucher she was not allowed in the cafeteria, and to leave the area. Stewart immediately proceeded to the cafeteria, and upon his arrival found Boucher upset and yelling in a loud voice at the officer, accusing the officer of harassing Boucher. Upon Stewart's arrival, Boucher started yelling at Stewart, accusing Stewart of harassment, and alleging that Boucher had the permission of the Board agent conducting the election, to be present in the cafeteria.

As soon as Stewart was advised by Boucher, that Boucher had permission from the Board agent to be present in the cafeteria, Stewart left the cafeteria to go to the polling area, to confirm with the Board agent, that Boucher indeed had such permission. The polling area was located in an area of the hospital away from the cafeteria, which necessitated travel down several corridors to reach the polling area.

Once Stewart reached the polling area, he informed Yost, who was present in the area, of what had transpired in the cafeteria with Boucher, and the fact that Boucher had claimed that she had permission from the Board agent to be present in the cafeteria. Yost, in turn, called over the Board agent and attempted to confirm that the Board agent, in fact, had given such permission to Boucher. The Board agent informed Stewart and Yost that he had not given such permission to Boucher to go to the Employer's cafeteria. Stewart immediately left the polling area to go back to the cafeteria to escort Boucher back to the polling area.

As Stewart went toward the cafeteria, he met Boucher, who had left the cafeteria, in a hallway coming toward the polling area. Boucher immediately starting yelling at Stewart, in a loud voice, about Stewart's harassment of her, and of being followed. Stewart followed Boucher through the hospital corridors to the polling area, a distance in excess of 200 feet which was covered in less then 2 minutes. During this entire period Boucher continued to "yell" her views concerning the treatment she was experiencing at the hands of the Employer; i.e., harassment, being followed, not being left alone, not being able to get a drink. During the period of time that Boucher and Stewart were walking toward the polling area, Boucher was not directing her complaints to any specific individual, including Stewart, but rather was directing them to the air in general.

Upon arrival just inside the room where the polling area was located, Boucher persisted in "yelling" in a loud voice about the treatment she was receiving, to Dana Hahn, a stipulated union representative, specifically about being harassed and being followed around. Boucher's complaints were made in close proximity to the doorway to the hallway, where upward of 20 employees were waiting for the second polling session, scheduled for 2 p.m., to open so that they could vote.

During the time that Boucher was in the polling area voicing her complaints about harassment and being followed, the Board agent cautioned Boucher three times within a period of a minute and one half to calm down, and on the third occasion telling Boucher to take the problem outside the polling area. At this time, it was a few minutes past 2 p.m., the scheduled starting

time for the second polling session. Approximately 2 to 3 minutes prior to the actual start of the polling session, approximately 2:10 p.m., Boucher had calmed down, and there was no evidence presented that Boucher voiced her concerns about the Employer's treatment of her during the course of that or any of the subsequent polling sessions.

Employer counsel, in his brief, presents a three-fold argument as to how Boucher's conduct was sufficiently objectionable to warrant overturning the results of the instant election. The first argument advanced by employer counsel is a general argument that the proper test to be applied to Boucher's conduct, is whether it "reasonably tended to interfere with the employee's free and uncoerced choice in the election." *Baja's Place,* 268 NLRB 868 (1984). Counsel further cites *Avis Rent-A-Car System,* 280 NLRB 580 (1986), where the Board set forth the following factors for evaluating whether employees could freely and fairly exercise their choice in an election. The factors were as follows:

> (1) the number of the incidents of misconduct;
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> (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit;
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> (3) the number of employees in the bargaining unit subjected to the misconduct;
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> (4) the proximity of the misconduct to the election date;
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> (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees;
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> (6) the extent of dissemination of the misconduct among the bargaining unit employees;
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> (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct;
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> (8) the closeness of the final vote; and
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> (9) the degree to which the misconduct can be attributed to the union.

After evaluating all these factors, I conclude that the conduct complained of, by Boucher, did not reasonably tend to interfere with the employee's free and uncoerced choice in the election, for the following reasons.

The conduct complained of consisted of only one incident which occurred within an approximately 30-minute period prior to and/or during the first 10 minutes of the scheduled second voting session, on the first day of a scheduled 2-day voting period. The conduct complained of was loud "yelling" remarks directed by Boucher, while in the Employer's cafeteria, to a security officer, a nonunit employee; and to the Employer's director of security, also a nonunit employee; that security was harassing Boucher. These remarks were allegedly overheard by an unknown number of unit employees present in the cafeteria Boucher then continued to make loud "yelling" undirected remarks during the approximately 2 to 3 minutes that were spent traveling the distance from the cafeteria to the polling area, during which period of time, an unknown number of unit employees were alleged to have overheard Boucher's utterances. Once Boucher reached and entered the polling area, Boucher continued her outburst and 10–15 eligible voters waiting in line to vote, allegedly heard Boucher's loud and heated remarks.

However, there was no evidence presented that Boucher uttered any threats directed toward the Employer or other unit employees, or directed any calls to action toward unit employees. Rather**,** the statements made were those of any apparently disgruntled, upset, and/or angry prounion employee concerning perceived disparate treatment directed toward herself, and herself only; not to the unit employees as a whole. As such, I find that Boucher's statements, yelled or screamed, failed to cause sufficient fear or coercion among bargaining unit employees that would rise to the level that would cause interference with the employees free and uncoerced choice in the election. I note the factors listed by the Board in *Avis Rent-A-Car System,* supra, such as proximity of the misconduct to the election date, the closeness of the final vote, and the degree to which the misconduct could be attributed to the Union would tend to be supported by the evidence in the instant case, whereas they are balanced by the lack of evidence supporting such factors as the decree of persistence of the misconduct in the minds of the bargaining unit employees, the extent of dissemination of the misconduct among the bargaining unit employees, and the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct, and as such these opposing factors cancel themselves out. I therefore find that Boucher's conduct did not destroy and/or interfere with the laboratory conditions of the election, which would warrant setting aside the instant election.

Employer counsel's second argument contends that Boucher's conduct consisted of impermissible electioneering which violated the rule set , forth in *Milchem, Inc.,* 170 NLRB 362 (1968), which states, "[S]ustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election."

Initially, I note that there was no evidence presented that Boucher, did in fact, engage in conversation with any prospective voters waiting to cast their ballots, and this is acknowledged by the employer counsel. Counsel argues, rather, that Boucher engaged in a "long and sustained diatribe" against the Employer which was voiced with sufficient volume to have been overheard by the eligible voters outside the polling area, thus obviating the need for *direct* (emphasis added) conversation with the prospective voters.

Counsel further argues that it is not necessary for a party to directly engage in "conversation" with eligible voters to violate the Board's *Milchem* rule, citing *Fieldcrest Cannon, Inc.,* 318 NLRB 470 (1995). *Fieldcrest,* supra, involved a situation where supervisors showed placards listing strikes by the union to voters while the voters were in line to vote, but did not, in fact, speak to the employees. This conduct was found violative of the *Milchem* rule, as a continuation of unlawful conduct, i.e., conversations with employees; that had occurred prior to the start of the election.

In the instant case, there is no evidence or contention that "conversation," that is, "oral exchange of sentiments, observations, opinions, or ideas," Webster's, New Collegiate Dictionary, 1977, with emphasis or "exchange" occurred, and as such I conclude that Boucher's conduct did not violate the Board's *Milchem* role, and therefore the election should not be aside on this basis.

Employer counsel's third argument contends that Boucher's conduct violated the rule set forth in *Peerless Plywood Co.,* 107 NLRB 427 (1953), where the Board stated, "This rule shall be that Employers and Unions alike will be prohibited from making election speeches on company time to massed assemblies of

employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed." Counsel argues that Boucher's loud sustained complaints uttered in the presence of eligible voters constituted "campaign speech" encompassed by *Peerless Plywood,* supra. Counsel further acknowledges that even though Boucher's remarks were spontaneous and not made directly to the eligible voters, that that should not detract from the remarks speech like quality, citing *Montgomery Ward & Co.,* 124 NLRB 343 (1959), for the proposition that *Peerless Plywood,* supra, is not limited to a "formal speech in the usual sense." *Montgomery Ward,* supra, involved a situation where instead of an "election speech" the Employer held a question and answer session with its employees within the 24-hour period immediately proceeding the election, and there fore interfered with the election.

I find the situation here akin to the situation in *Mediplex of Milford,* 319 NLRB 281 (1995), where a union representative on the way to the polling area shouted out to employees in the lobby leading to the polling area, concerning a "victory party" to be held after the election. The Board found that if the remark had been made, it did not constitute a speech to a massed assembly of employees within 24 hours of the election as proscribed by *Peerless Plywood,* supra. With respect to the remarks made by Boucher, I conclude that those remarks did not constitute a "speech" to "massed assemblies of employees" as envisioned by the Board in *Peerless Plywood,* supra, and therefore did not violate the rule set forth therein, which would warrant setting aside the election in the instant case.